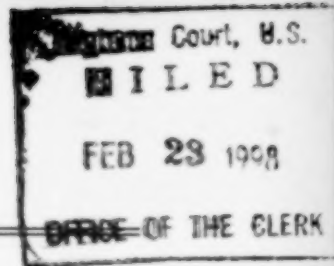


(11)  
No. 97-501



In The  
**Supreme Court of the United States**

October Term, 1997

— ♦ —  
RANDALL RICCI,

*Petitioner,*

v.

VILLAGE OF ARLINGTON HEIGHTS,  
A MUNICIPAL CORPORATION,

*Respondent.*

— ♦ —  
On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Seventh Circuit  
— ♦ —

BRIEF OF THE INSTITUTE FOR JUSTICE AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER  
INSTITUTE FOR JUSTICE  
— ♦ —

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## INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Central to the mission of the Institute for Justice is the protection of economic liberty, the right of an individual to earn an honest living in a chosen occupation, free from unreasonable or arbitrary government regulation. Toward that end, we have challenged numerous unconstitutional occupational licensing laws and the use of both civil and criminal penalties by governments to enforce those laws. We believe our expertise in this area can provide the Court with important and unique information that may be helpful in resolving the constitutional issue at stake in this case.

The Institute has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the clerk.<sup>1</sup>

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## STATEMENT OF THE FACTS

Randall Ricci is the president of a telemarketing firm that does charitable solicitations for a number of organizations, including (ironically enough) police officer unions. In April 1994, two police officers in Arlington

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<sup>1</sup> Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Heights, Illinois (a Chicago suburb) arrested Ricci at his place of business and charged him with operating a business without a license in violation of a fine-only municipal ordinance. As required by municipal policy, following his arrest, the officers transported Ricci to the police station where they locked him in an interrogation room for approximately one hour. While Ricci was in custody, his wife obtained the necessary business license and the ordinance violation was dismissed at his first court appearance. Following the conclusion of the state court proceedings, Ricci filed an action under 42 U.S.C. § 1983 against the Village for violation of his constitutional rights.

One of Ricci's claims in his civil rights complaint was that the Village's policy of requiring full custodial arrests for violations of fine-only ordinances not involving a breach of the peace violated the Fourth Amendment.<sup>2</sup> The district court concluded that the Village's policy of requiring arrests even for violations of its business-license ordinance did not offend the Fourth Amendment.

The United States Court of Appeals for the Seventh Circuit agreed, ruling that a municipality may require arrests for fine-only ordinances to "prevent[ ] Ricci from continuing to violate a law" and "in order to ensure compliance with the ordinance and in order to complete

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<sup>2</sup> Ricci also argued that he had been arrested without probable cause and that before arresting him, the police officers had illegally searched his premises by looking through various papers. The district court found against Ricci on the probable cause issue and the unreasonable search claim was settled. Neither claim is before this Court.

the necessary paperwork." *Ricci v. Village of Arlington Heights*, 116 F.3d 288, 291 (7th Cir. 1997). In the view of the Seventh Circuit, the arrest was "reasonable" under the Fourth Amendment, notwithstanding the common law prohibition on such arrests. This Court granted Ricci's petition for certiorari to determine whether the common law rule prohibiting full custodial arrests for violation of a fine-only ordinance not involving a breach of the peace is part of the Fourth Amendment.

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### SUMMARY OF ARGUMENT

The ability to arrest citizens is one of the most serious applications of state power to individuals. The Fourth Amendment to the United States Constitution guarantees our right to be free from unreasonable seizures at the hands of government officials. At the core of the Fourth Amendment lie fundamental protections of the common law. Among the protections afforded citizens at common law was the prohibition on warrantless arrests for minor offenses unless they involved a breach of the peace.

The United States Court of Appeals for the Seventh Circuit ignored this time-honored prohibition and instead adopted a more modern balancing approach to determine the reasonableness of Randall Ricci's arrest. The proper balance in this case, however, was already struck centuries ago in the traditions of the common law. Under a proper understanding of the Fourth Amendment based upon the common law and first principles, Mr. Ricci and others who violate minor laws that do not breach the peace cannot be subject to a warrantless, custodial arrest.

The ubiquity of licensing requirements and the proliferation of laws generally make it imperative that traditional protections against unlawful arrest be recognized today. Many licensing laws raise serious constitutional questions, and the potential for abuse of these laws is multiplied if enforcement officials possess the power to arrest for noncompliance. Enforcement of occupational licensing laws is typically given to licensing boards, often comprised of members of the regulated industries with a direct incentive to restrict competition and keep newcomers out of a profession. Protecting individuals from arrest for fine-only offenses that do not breach the peace will dramatically reduce the potential for abuse of licensing laws by government officials.

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#### ARGUMENT

#### I. THIS COURT SHOULD DRAW ON THE COMMON LAW PRINCIPLES AT THE CORE OF THE FOURTH AMENDMENT BY RECOGNIZING THE TIME-HONORED PROHIBITION OF WARRANTLESS ARRESTS FOR MINOR OFFENSES NOT INVOLVING A BREACH OF THE PEACE.

The Fourth Amendment to the United States Constitution declares that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." A full custodial arrest of an individual – like the arrest of Randall Ricci in this case – is the "quintessential 'seizure of the person' " under the Fourth Amendment. *California v. Hodari D.*, 499 U.S. 621, 624 (1991). An arrest has been traditionally defined as the "grasping or

application of physical force" by a police officer to a citizen. *Id.* It constitutes one of the most powerful and dramatic applications of state power to an individual. Not only do arrests constitute serious infringements on liberty, they also carry real-world consequences to individual citizens. The statement "So-and-So has been arrested" still carries enough shock value to most people that even a relatively routine arrest and detention like that experienced by Mr. Ricci could have serious repercussions among business associates, friends, and family. That is one of the reasons why strict rules governing arrests evolved at common law and were embodied in the Fourth Amendment.

Of course, many arrests, even those without a warrant, are constitutional, for the Fourth Amendment only prohibits "unreasonable" searches and seizures. The Fourth Amendment established a "practical compromise between the rights of individuals and the realities of law enforcement." *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991). Courts normally strike the proper balance between these two principles to determine which searches and seizures are reasonable. *See, e.g., Payton v. New York*, 445 U.S. 573, 585 (1980) (a warrantless arrest "is a species of seizure required by the [Fourth] Amendment to be reasonable"). However, for the issue in this case, the balance has already been struck centuries ago in the traditions of the common law.

The common law clearly prohibited the warrantless arrest of an individual for a minor offense unless it involved a breach of the peace. A "peace officer" at

common law had "no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence." *Halsbury Law's of England*, vol. 9, part III, 612 (quoted in *Carroll v. United States*, 267 U.S. 132, 156 (1925)).

This common law guarantee has direct bearing on protections afforded individuals under the Fourth Amendment. As Justice Story noted, the Fourth Amendment "is little more than the affirmance of a great constitutional doctrine of the common law." 3 J. Story, *Commentaries on the Constitution* 748 (1833). This Court has also held that the "common law . . . has guided interpretation of the Fourth Amendment." *Gernstein v. Pugh*, 420 U.S. 103, 114 (1976).<sup>3</sup> Typically, the Fourth Amendment assures protection of the common liberties of

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<sup>3</sup> The common law is instructive in interpreting other provisions of the Constitution as well. Indeed, constitutional scholar Randy Barnett notes that the "freedom to act within the boundaries provided by one's common law rights may be viewed as a central background presumption of the Constitution. . . ." Barnett, "James Madison's Ninth Amendment," in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* 41 (1989); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (guaranteeing non-textual rights "long recognized at common law as essential to the orderly pursuit of happiness by free men"); *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977) (the Due Process Clause . . . was intended to give Americans at least the protection against government power that they had long enjoyed as Englishmen against the power of the Crown").

citizens that were guaranteed at the time of the Founding. *Hodari D.*, 499 U.S. at 633-34.

Although this Court has recognized some exceptions to common law rights, they are not relevant to the instant case. For instance, this Court has departed from the common law in Fourth Amendment cases when common law doctrines are vague or are not particularly instructive to the Court. See, e.g., *Steagwald v. United States*, 451 U.S. 204, 220 (1981) (explaining that common law "sheds relatively little light" on the legality of a warrantless intrusion on a third party's home); *McLaughlin*, 550 U.S. at 54-55 (noting that common law is unclear as to what constitutes a "prompt" post-seizure probable cause determination despite dissent's claim to the contrary). Also, this Court has recognized that certain modern realities of law enforcement have rendered common law rules inapplicable. See, e.g., *California v. Acevedo*, 500 U.S. 565 (1991) (recognizing that changes in the law may make a warrant necessary to satisfy reasonableness standard even if it was not required at common law); *Minnesota v. Dickerson*, 508 U.S. 366, 379-83 (1993) (Scalia, J., concurring) (suggesting that a frisk for weapons without probable cause might be "reasonable" today due to easy availability of concealed weapons even if such a search was unlawful at common law).

In this case, however, the common law could not be more clear or straightforward: warrantless arrests for minor offenses are prohibited unless they involve a breach of the peace. Likewise, contemporary realities make the common law rule even more compelling today. The ubiquity of licensing laws and the proliferation of regulations generally make it imperative that traditional

protections against unlawful arrest afforded to citizens at common law be recognized today. *See* Section II, *infra*.<sup>4</sup> Accordingly, permitting police officers to arrest individuals for violating fine-only ordinances not involving a breach of the peace must be recognized as an unreasonable seizure under the Fourth Amendment.

## II. THE GROWTH OF OCCUPATIONAL LICENSING LAWS AND THEIR POTENTIAL FOR ABUSE BY LICENSING BOARDS MAKE IT IMPERATIVE THAT CONSTITUTIONAL RIGHTS BE RESPECTED WHEN GOVERNMENTS ENFORCE THESE LAWS.

The Seventh Circuit discounted the potential for police abuse (raised by Ricci's counsel) if the common law was not recognized. *Ricci*, 116 F.3d at 292 (rejecting as a histrionic "list of horrors" the possibility of governments using leg irons and shackles for misdemeanor arrests, or subjecting arrestees to strip and full body cavity searches). However speculative the list of potential police abuses may be, a well-documented and often overlooked threat is directly implicated by this case – the potential for abuse of occupational licensing laws at hands of self-serving licensing officials.

As discussed *infra*, occupational licensing laws often raise serious constitutional questions by interfering with a vital constitutional liberty: the right of individuals to

<sup>4</sup> The common law principle in this case also has the benefit of creating a bright line rule for government officials rather than the after-the-fact balancing test offered by the Seventh Circuit to determine the "reasonableness" of arrests for fine-only offenses.

pursue legitimate business professions free from excessive government interference.<sup>5</sup> Giving licensing officials the power of arrest only exacerbates these constitutional problems and creates a vehicle for intimidating citizens from exercising their rights and from challenging licensing requirements.

In this case, Randall Ricci was arrested for operating a business without a license. The Village of Arlington Heights's business license requirement is not unique. Today, occupational licensing laws are ubiquitous. Close to 500 occupations, covering approximately 10% of all jobs in this country, are currently licensed. Young, *The Rule of Experts: Occupational Licensing in America* 5 (1987); Bolick, *Grassroots Tyranny* 141-46 (1993).<sup>6</sup> Licensed

<sup>5</sup> *See, e.g., Truax v. Raich*, 239 U.S. 33, 41 (1915) ("the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity" protected by the Constitution); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow chosen professions free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment"); *see also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-81 and n.10 (1985).

<sup>6</sup> The Institute for Justice last year issued reports on barriers to entrepreneurship, including occupational licensing laws, in Detroit, Boston, San Diego, Charlotte, Baltimore, San Antonio, and New York. *See* Berliner, *How Detroit Drives Out Motor City Entrepreneurs*; Berliner, *Running Boston's Bureaucratic Marathon*; Bolick, *Brightening the Beacon: Removing Barriers to Entrepreneurship in San Diego*; Bolick, *Entrepreneurship in Charlotte: Strong Spirit, Serious Barriers*; Bullock, *Baltimore: No Harbor for Entrepreneurs*; Matias, *Entrepreneurship in San Antonio: Much to Celebrate, Much to Fight For*; Mellor, *Is New York City*

occupations run the gamut from doctors and lawyers to barbers, beekeepers, and lightning rod salesmen.<sup>7</sup> Occupational licensing requirements are in addition to existing laws protecting the public from fraud and unsafe or defective products and services.<sup>8</sup> Typically, violations of such laws are misdemeanors that result in fines (although some laws carry possible jail sentences as well).

The economic literature is virtually unanimous in the view that most licensing laws go far beyond – and indeed are often entirely unrelated to – legitimate health and safety objectives of government. Indeed, the literature is overwhelmingly against licensure as a public policy.<sup>9</sup> As

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*Killing Entrepreneurship?* The Institute's city studies are available on-line at [http://www.ij.org/publication\\_folder/Otherpub\\_folder/CitStud.html](http://www.ij.org/publication_folder/Otherpub_folder/CitStud.html).

<sup>7</sup> California alone requires licenses for entry into 178 occupations, prompting Professor Leonard Levy to remark that "[a]bout the only people who are unlicensed in California are clergymen and university professors, apparently because no one takes them seriously." Levy, "Property as a Human Right," 5 Const. Commentary 169, 171 (1988).

<sup>8</sup> Disallowing arrests for violations of fine-only licensing ordinances would not in any way affect the ability of governments to enforce health and safety laws. Indeed, Arlington Heights did not claim it arrested Ricci to protect the public, but rather to fulfill its interests in making sure the licensing ordinance was obeyed and to complete the "necessary paperwork." Ricci, 116 F.3d at 291-92.

<sup>9</sup> See, e.g., Friedman, *Capitalism and Freedom* (1962); Gellhorn, *Individual Freedom and Governmental Restraints* (1956); Rottenberg, "The Economics of Occupational Licensing," in *Aspects of Labor Economics* (1962); Rottenberg, ed., *Occupational Licensure and Regulation* (1980); Shimberg, et al. *Occupational Licensing: Policies and Practices* (1973); Stigler, "The Theory of

economics professor Simon Rottenberg concludes, most economists oppose licensure because it limits entry into the licensed occupations, raises the prices of services rendered in them, produces monopoly profits for some practitioners, does not clearly improve the mean quality of service and makes consumers worse-off by foreclosing lower-quality and lower price options for them. Rottenberg, *Occupational Licensure and Regulation*, *supra*.<sup>10</sup>

The economic literature against occupational licensure as a policy is in stark contrast to the legal and political climate, which stands foursquare in favor of licensing requirements. This clash between economic wisdom and political reality – and the origins and continuation of occupational licensing – is explained by Gellhorn:

Licensing has only infrequently been imposed upon an occupation against its wishes. . . . Licensing has been eagerly sought [by the licensed occupation] – always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers. That restricting access is the real purpose, and not merely a side effect, of many if not most successful licensing

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Economic Regulation," *Bell Journal of Economics and Management Science* (Spring 1971); Young, *The Rule of Experts: Occupational Licensing in America* (1987).

<sup>10</sup> For a dissident economic viewpoint in support of licensure, see Leland, "Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards," *Journal of Political Economy* 1328-46 (December 1979). But see Young, *supra*, at 15-21 (discussing literature rebutting Leland's theory).

schemes can scarcely be doubted. Licensing, imposed ostensibly to protect the public, almost always impedes only those who desire to enter the occupation or 'profession'; those already in practice remain entrenched without a demonstration of fitness or probity.

Gellhorn, "Abuse of Occupational Licensing," 44 *U. Chi. L. Rev.* 1, 11 (1976).<sup>11</sup> Not surprisingly, then, legislatures are almost entirely unpersuaded by the wealth of data and information on licensing, and continue to support calls by industries to institute or expand licensing.

The potential for abuse of occupational licensing laws is multiplied if enforcement officials possess the power of arrest for noncompliance. Enforcement of occupational licensing laws typically is given to licensing boards, often comprised of individuals who are members of the regulated industries themselves with a direct incentive to restrict competition and keep newcomers out of a profession. Reflecting the wisdom of the economists discussed above, albeit in a far more colloquial and

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<sup>11</sup> Economist Alex Maurizi further explains:

Occupational licensing has been justifiable in the view of legislatures on the grounds that it protects the public interest; often, however, it is the producers of the good or service who present this argument to the state legislatures. This is hardly surprising, since the typical consumer is likely to suffer too small a wealth loss (in the form of higher prices) in the licensing of one more occupation . . . . The end result is the promotion of the interests of the producer group rather than those of the public.

Maurizi, "Occupational Licensing and the Public Interest," *Journal of Political Economy* (March-April 1974).

engaging manner, a former Virginia state official said of licensing boards: "The great truth that is never spoken directly, but anybody in the field with two bourbons in them will tell you, is that these boards work primarily to protect the practitioners and have little or nothing to do with protecting the public." Quoted in Isikoff, "Mustering the Political Will to Deregulate Va. Professions," *Washington Post*, February 7, 1983.<sup>12</sup>

What makes the power of licensing boards significant from a constitutional standpoint is their ability to wield civil and criminal penalties in enforcing legal cartels. Because of the economic protectionism and inherent incentives to restrict competition at the heart of most licensing schemes, the temptation to expand the use of arrests will invariably prove irresistible. This is especially true if governments can justify warrantless arrests on

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<sup>12</sup> It has also been repeatedly observed that occupational licensing laws have a devastating impact on people outside the economic mainstream, particularly minorities and the poor. Economist Walter Williams argues that many licensing statutes "discriminate against certain people," particularly "outsiders, latecomers and [the] resourceless" among whom members of minority groups are "disproportionately represented." Williams, *The State Against Blacks* xvi (1982); see also Institute for Justice City Studies, *supra* (documenting numerous licensing laws that work to the economic disadvantage of the poor in inner-city neighborhoods). This Court first recognized in *Yick Wo v. Hopkins*, 118 U.S. 356 (1896) that even facially neutral licensing laws can be deliberately used against racial minorities. See also Bernstein, "Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African Americans," 31 *San Diego L. Rev.* 89 (1994) (containing numerous historical examples of licensing laws being used against the interests of minorities).

such thin reeds as the need to "ensure compliance" with an ordinance and to complete the "necessary paperwork" like Arlington Heights did in the instant case. It is thus imperative that constitutional guarantees, including the common law prohibition of arrests for fine-only violations, be vigorously enforced in this arena.

Abuse of the criminal process by licensing authorities is not confined to the realm of sophisticated economic theory. Such abuses are well-documented in recent battles between licensing officials and economic outsiders. For instance, a black barber, Garland Allen, was arrested in Lebanon, TN in July 1995 in the shop where he had worked since he was a little boy. As he told the *Nashville Banner*, when he was young, there was no barber school for blacks in his area, even in Nashville, so he never obtained a license from the barber board. Woods, "Barber Caught in State's Cross Hairs; Regulators Demand Veteran Haircutter Get Proper License," *The Nashville Banner*, August 26, 1997. This incensed a rival barber, who turned him in to the Tennessee Board of Barber Examiners. The Board directed the police to arrest Mr. Allen and insisted that the local district attorney prosecute the case.<sup>13</sup> A grand jury refused to indict the well-loved barber. But that did not stop Evelyn Griffin, the barber board's chief administrator who said, "That grand jury made me mad. . . . We'll probably have him arrested. Why should

<sup>13</sup> The Board also insisted that Mr. Allen obtain a barber's license to remain in business, which would have required him to take off approximately nine months from his shop and pay close to \$5,000 - all to learn a trade he has been practicing for over 30 years.

this one man be allowed to operate without a license?" *Id.*<sup>14</sup>

The Institute for Justice is also investigating the arrests of limousine drivers in Las Vegas, Nevada that have occurred over the past few months. These drivers have been handcuffed (causing injury in some instances) and detained for hours before being charged with driving without a limousine license. The limousine industry in Las Vegas has been controlled by a handful of owners for approximately the last 30 years. All of the licensed limousine companies are operated by these organizations, and only a few new licenses have been issued during that time permitting only severely limited service. In New York City, licensed van drivers have been the subject of a campaign of police harassment due to their competition with government transportation authorities. *See, e.g., Manti v. New York City Transit Authority*, 568 N.Y.S.2d 16 (App. Div. 1991) (denying motion to dismiss section 1983 suit brought by van drivers against efforts by city to "drive plaintiffs out of business").

Also in New York, street artists were routinely arrested for not having a license: "Between 1993 and 1996 more than 400 New York City artists were handcuffed and arrested for displaying or selling original paintings,

<sup>14</sup> The Garland Allen case was eventually resolved due to a settlement brokered by the Institute for Justice. Mr. Allen performed a haircut before members of the barber board (to ensure that he in fact did know how to cut hair) and agreed to submit to annual inspections of his business. Otherwise, he continues to happily ply his trade to his loyal customers at his People's Barber Shop without fear of arrest and prosecution.

photographs, sculptures, and limited edition prints on the street." "Guiliani Administration Appeals Street Artist Case to U.S. Supreme Court," *M2 Presswire*, February 26, 1997. These arrests were primarily a tool of abuse and harassment of the artists' First Amendment rights, for not one of the artists' cases was ever brought to trial, yet "the City systematically destroyed the thousands of works of art it confiscated." *Id.* The artists eventually filed a constitutional challenge to the City's actions. The arrests and destruction of property only ended when the United States Court of Appeals for the Second Circuit ruled that the City's requirement that the artists be licensed in order to sell their artwork in public spaces constituted an unconstitutional infringement of their First Amendment rights. *Bery v. City of New York*, 97 F.3d 689 (2d Cir.), *cert. denied*, 117 S.Ct. 2408 (1997).

As both *Manti* and the artist cases from New York compellingly demonstrate, many licensing laws and their application raise serious constitutional concerns.<sup>15</sup> In this

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<sup>15</sup> Challenges to unreasonable licensing laws and prohibitions on an individual's right to pursue the occupation of one's choice have proliferated in recent years, with some success. See *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989) (striking down prohibition on ability of shoeshiners to obtain a license to operate on District of Columbia streets); *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994) (declaring prohibition on jitney service unconstitutional under due process and equal protection clauses of the U.S. Constitution); *Cornwell v. California Board of Barbering and Cosmetology*, 962 F. Supp. 1260, 1277 (S.D. Cal. 1997) (denying government's motion to dismiss constitutional challenge to application of cosmetology licensing law to African hairbraiders); but see *Jones v. Temmer*, 829 F. Supp. 1226 (D. Colo. 1993) (granting motion to dismiss lawsuit

case, the Court need not address the constitutionality of Arlington Heights's licensing law or any other licensing requirement. This Court can ensure, however, that licensing laws and myriad other minor laws and regulations do not become a tool of abuse and oppression at the hands of self-serving administrative boards and agencies.

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## CONCLUSION

For the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court reverse the opinion below.

Respectfully submitted,

INSTITUTE FOR JUSTICE  
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challenging the State of Colorado's prohibition on the granting of new taxicab licenses in Denver).